

Modderklip Revisited: Can Courts Compel the State to Expropriate Property where the Eviction of Unlawful Occupiers is not Just and Equitable?*

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Date of submission

10 November 2017

Date published

3 July 2018

Editor Dr G Viljoen

How to cite this article

Dugard J "Modderklip Revisited: Can Courts Compel the State to Expropriate Property where the Eviction of Unlawful Occupiers is not Just and Equitable?" *PER / PELJ* 2018(21) - DOI <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a3477>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2018/v21i0a3477>

Abstract

This article examines whether, to give effect to the section 26 constitutional right to adequate housing, courts can (or should) compel the state to expropriate property in instances when it is not just and equitable to evict unlawful occupiers from privately-owned land (unfeasible eviction). This question was first raised in the *Modderklip* case, where both the Supreme Court of Appeal (*Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA)) and Constitutional Court (*President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC)), dodged the question, opting instead to award constitutional damages to the property owner for the long-term occupation of its property by unlawful occupiers. It is clear from cases such as *Ekurhuleni Municipality v Dada* 2009 4 SA 463 (SCA), that, mindful of separation of powers concerns, courts have until very recently been unwilling to order the state to expropriate property in such circumstances. At the same time, it is increasingly evident that the state has failed to fulfil its constitutional obligations to provide alternative accommodation for poor communities. In this context, this article argues that there is a growing need for the judiciary to consider, as part of its role to craft effective remedies for constitutional rights violations, the issue of judicial expropriation. It does so, first, through an analysis of the relevant jurisprudence on evictions sought by private landowners and, second, through an in-depth engagement of the recent Western Cape High Court case, *Fischer v Persons Listed on Annexure X to the Notice of Motion and those Persons whose Identity are Unknown to the Applicant and who are Unlawfully Occupying or Attempting to Occupy Erf 150 (Remaining Extent) Phillippi, Cape Division, Province of the Western Cape; Stock v Persons Unlawfully Occupying Erven 145, 152, 156, 418, 3107, Phillippi & Portion 0 Farm 597, Cape Rd; Copper Moon Trading 203 (Pty) Ltd v Persons whose Identities are to the Applicant Unknown and who are Unlawfully Occupying Remainder Erf 149, Phillippi, Cape Town* 2018 2 SA 228 (WCC).

Keywords

Housing rights; unfeasible eviction; effective remedy; judicial expropriation.

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1 Introduction

The issue of the judicial expropriation of property in the context of an unfeasible eviction was first raised in the *Modderklip* case. Here, the Supreme Court of Appeal (SCA) grappled with the conundrum of how to protect the property rights of a landowner whose land had been unlawfully occupied by 40,000 people rendered homeless following their eviction by the state, while at the same time protecting the housing-related rights of the unlawful occupiers. Finding that "in an ideal world the state would have expropriated the land and taken over [Modderklip's] burden", the SCA tantalisingly remarked: "it is questionable whether a court may order an organ of state to expropriate property."¹ Leaving this question unanswered, the SCA instead devised the novel remedy of constitutional damages for the infringement of the landowner's property rights.² On appeal, the Constitutional Court (CC), too, dodged the question, finding that "it is not necessary to decide, in this case, whether or not a court can order the expropriation of property."³

Yet this is a question that is increasingly coming into play in the context of orders sought for the eviction of unlawful occupiers by private landowners where – as in the *Modderklip* case - the scale and/or duration of the occupation combined with the non-existence of alternative housing means that it is not just and equitable to grant an eviction order. Seeking to contribute towards a response to the question left hanging by the SCA and CC *Modderklip* judges, this paper critically examines whether courts can and should require state organs to expropriate property where an eviction is not feasible. It does so a) through an analysis of the relevant jurisprudence on evictions sought by private landowners and b) in the light of the current *Fischer* litigation⁴ that has sought to compel the state to

* I am grateful for very useful comments on an earlier draft of this paper from Sandra Liebenberg, Jonathan Klaaren and Danie Brand, as well as two anonymous reviewers. I would like to thank the Wits Southern Centre for Inequality Studies (SCIS) for contributing towards this research.

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¹ *Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA) (hereafter *Modderklip SCA*) para 41.

² *Modderklip SCA* para 43.

³ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) (hereafter *Modderklip CC*) para 64.

⁴ *Fischer v Persons Listed on Annexure X to the Notice of Motion and those Persons whose Identity are Unknown to the Applicant and who are Unlawfully Occupying or Attempting to Occupy Erf 150 (Remaining Extent) Phillipi, Cape Division, Province*

exercise its statutory powers to expropriate land to accommodate vast numbers of unlawful occupiers at Marikana informal settlement in Cape Town.

2 The eviction conundrum: What to do when a private property eviction is not just or equitable?

Section 26(1) of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*) guarantees everyone's right to access to adequate housing, and section 26(3) provides that "no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances." The protection against eviction without a court order is elaborated on in the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998* (PIE), which establishes in sections 4(6) and 4(7) that a court may grant an order for eviction only if it is "in the opinion that it is *just and equitable* to do so, after considering all the relevant circumstances".⁵

Section 4(6) applies to cases in which an unlawful occupier has occupied the land for less than six months prior to eviction proceedings being commenced, and lists among the relevant circumstances for a court to consider the "rights and needs of the elderly, children, disabled persons and households headed by women." Section 4(7) applies to cases in which an unlawful occupier has occupied the land for more than six months prior to eviction proceedings' being commenced, and over and above the rights and needs of the elderly, children, disabled persons and households headed by women, lists as a relevant circumstance to be considered by any judge "whether [except where the land is sold in a sale of execution pursuant to a mortgage] *land has been made available or can reasonably be made available by a municipality or other organ of state* or another land owner for the relocation of the unlawful occupier ..."⁶ Although there was initially some uncertainty about whether the provision of alternative land (or accommodation) should be considered as a relevant factor only in occupations of longer than six months, in *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*⁷ and *Occupiers of Portion*

of the Western Cape; Stock v Persons Unlawfully Occupying Erven 145, 152, 156, 418, 3107, Phillipi & Portion 0 Farm 597, Cape Rd; Copper Moon Trading 203 (Pty) Ltd v Persons whose Identities are to the Applicant Unknown and who are Unlawfully Occupying Remainder Erf 149, Phillipi, Cape Town 2018 2 SA 228 (WCC) (hereafter *Fischer*).

⁵ Own emphasis.

⁶ Own emphasis.

⁷ 2010 4 All SA 54 (SCA).

*R25 of the Farm Mooiplaats 355 JR v Golden Threat Ltd*⁸ the courts established decisively that the lists in both section 4(6) and 4(7) of relevant circumstances for courts to consider prior to granting an eviction order were in-exhaustive and that in many situations alternative land/accommodation would be a relevant factor to consider in occupations of shorter than six months.

More generally, through a series of cases – most notably *Government of the Republic of South Africa v Grootboom*⁹ and *Port Elizabeth Municipality v Various Occupiers*¹⁰ – the CC has established that it would ordinarily not be just and equitable to evict unlawful occupiers if this would render them homeless, translating into a positive obligation for the state to provide emergency shelter where an eviction would otherwise lead to homelessness. In the context of state-led evictions,¹¹ rather than resulting in the wholesale provision of emergency shelter, the positive obligation to provide emergency shelter to evictees has for the most part (and particularly in the City of Johannesburg where many of the more recent evictions cases have been located) resulted in the state's simply not seeking the eviction of unlawful occupiers.¹² But any unofficial slowdown on state-led evictions has not stopped private landowners from seeking to evict unlawful occupiers in order to enjoy their full range of property rights, including the rights to use and redevelop their properties unencumbered by unlawful occupiers.

⁸ *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Threat Ltd* 2012 2 SA 337 (CC) (hereafter *Mooiplaats*) para 16 reads: "While this distinction [regarding the reference to less than six months' occupation or more than six months' occupation in ss 4(6) and 4(7) of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (PIE), respectively] is important, I do not think it is decisive to the justice and equity enquiry. This is because, if a court has before it a case in which the land occupation falls short of six months, it is obliged to consider all relevant circumstances. In an enquiry of this kind, a court should determine what the relevant circumstances are."

⁹ 2001 1 SA 46 (CC) (hereafter *Grootboom*).

¹⁰ 2005 1 SA 217 (CC).

¹¹ State-led evictions occur when the state seeks to evict from state-owned land or from privately-owned land in the public interest as authorised by s 6 of PIE, which empowers an organ of the state to institute eviction proceedings in relation to any land falling within its jurisdiction.

¹² In some municipalities, including eThekweni and Cape Town, the state attempts to get around s 26's positive and negative obligations by engaging "anti-land invasion units" to try to prevent people from occupying land and to demolish any shacks found on land. This practice by eThekweni Municipality was found to amount to unlawful eviction in the *Zulu* case (*Zulu v eThekweni Municipality* 2014 4 SA 590 (CC)); and *MEC for Human Settlements and Public Works of the Province of KwaZulu-Natal v eThekweni Municipality* 2015 4 All SA 190 (KZD)). In Cape Town, this practice has given rise to the Marikana case discussed here.

One such case was *Modderklip*. Here, Modderklip Boerdery (Pty) Ltd. (Modderklip) was a private landowner of agricultural land in the Benoni area of Johannesburg. In May 2000 Modderklip's land was occupied by approximately 400 people, who erected 50 shacks on Modderklip's land after the municipality had evicted them from the nearby Chris Hani informal settlement. Seeking to vindicate its property rights, Modderklip began to lay trespass charges against the occupiers. However, those convicted were released by the court with warnings and immediately resumed their occupation; and subsequently the head of the local prison asked both Modderklip and the police to refrain from any further criminal charges against the occupiers as there was no space in the prison to accommodate them if they were sentenced to prison terms.¹³

By October 2000, the Modderklip informal settlement, which became known as Gabon, had swelled to accommodate approximately 18,000 people in over 4,000 shacks. At this point, having failed in an attempt to get the municipality to purchase the land, Modderklip applied to the High Court for an eviction order, which was granted in April 2001, authorising the sheriff to enlist the police if necessary in executing the order.¹⁴ However, by the time the eviction order became executable, the settlement had grown to 40,000 people, prompting the sheriff to insist on engaging a private security firm to assist with the eviction and requiring a deposit of R1.8 million (which later escalated to R2,2 million), which Modderklip refused to pay since this was more than the land was worth.¹⁵ Modderklip then brought a further application in the High Court to compel the state to execute the eviction order. The High Court granted this order, holding that the state was in breach of its constitutional obligations to protect property rights by failing to give effect to the eviction order (the continued occupation on the land despite an eviction order was a serious deprivation of the property owner's rights).¹⁶ Both High Court judgments were appealed by the state to the SCA.

According to the judgment of Harms JA in the SCA:

Basic to this case is Modderklip's right to its property entrenched by section 25(1) of the Bill of Rights which provides that 'no one may be deprived of property except in terms of a law of general application.' De Villiers J [in the court a quo] found that the refusal of the occupiers to obey the eviction order amounted to a breach of this right... Counsel for the state accepted that this

¹³ *Modderklip CC* para 5.

¹⁴ *Modderklip Boerdery (Pty) Ltd v Modderklip East Squatters* 2001 4 SA 385 (W).

¹⁵ *Modderklip CC* para 9.

¹⁶ *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid Afrika* 2003 6 BCLR 638 (T).

finding was justified. Counsel also accepted that the unlawful occupation of Modderklip's land *per se*, even had the eviction order not been granted, amounted to a breach of the section 25(1) right. I agree.

The occupiers have a right of access to housing under section 26(1). That it exists is not in issue... But the real issue is not the existence of the right; it is whether the state has taken any steps in relation to those who, on all accounts, fall into the category of those in 'desperate need'.¹⁷ The answer appears to be fairly obvious; it did not. Does the state have any plan for the 'immediate amelioration of the circumstances of those in crisis?'¹⁸ The state, at all three levels, central, provincial and local, gave the answer and it is also no. The medium and long term plans at present also provide no apparent solution.¹⁹

Commenting on the state's absence of any plans to ameliorate the plight of the Gabon occupiers, Harms JA highlighted that:

To the extent that we are concerned with the execution of the court order, *Grootboom* made it clear that the government has an obligation to ensure, at the very least, that evictions are executed humanely.²⁰ As must be abundantly clear by now, the court order cannot be executed – humanely or otherwise – until the State provides some land.²¹

And, concluding that "the state was in breach of its obligations to the occupiers [and this] leads ineluctably to the conclusion that the state simultaneously breached its section 25(1) obligations towards Modderklip",²² Harms JA ruled that it would not be just and equitable to grant the eviction order and the only appropriate relief was to allow the occupiers to remain on the land until alternative land or accommodation was made available to them by the state.²³ It is in this context that the SCA raised the issue of expropriation, noting that "the state may, obviously, expropriate the land in which event Modderklip will not longer suffer any loss ...".²⁴ However, having commented that "it is questionable whether a court may order an organ of state to expropriate property",²⁵ Harms JA sidestepped the issue by focusing instead on the novel remedy of "constitutional" damages, ordering the state for as long as the occupiers remained on the

¹⁷ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (*Grootboom*) para 63.

¹⁸ *Grootboom* para 64.

¹⁹ *Modderklip* SCA paras 21 and 22.

²⁰ *Grootboom* para 88.

²¹ *Modderklip* SCA para 26.

²² *Modderklip* SCA para 28.

²³ *Modderklip* SCA paras 43-44.

²⁴ *Modderklip* SCA para 43.

²⁵ *Modderklip* SCA para 41.

land to pay Modderklip for the violation of its constitutionally entrenched property rights.²⁶

On appeal to the CC, Langa ACJ upheld the SCA's findings, albeit with a rule of law focus,²⁷ and confirmed the declaratory order for the payment of constitutional damages to Modderklip. During the CC hearing, the question of whether the Court should order the state to expropriate the land instead of ordering an award for compensation was debated. Noting that this was strictly not an instance of "the compulsory acquisition of property by the state irrespective of the will of the owner" since the owner had indicated a "willingness, indeed eagerness, to sell the land to the state",²⁸ the CC eluded the question raised by the SCA, commenting that it was not necessary to decide whether "a court can order the expropriation of property."²⁹

In a subsequent case, *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*⁶⁰, the SCA (and the CC thereafter³¹) granted an eviction order to the owner of the property seeking to evict some 86 unlawful occupiers from an inner city building but made the eviction order contingent on the state's providing alternative housing for the occupiers. In doing so, the SCA distinguished the *Blue Moonlight* facts from those of *Modderklip*, highlighting that in *Modderklip* "because of the large number of persons on the land, their eviction was, for all practical purposes, impossible to achieve and that left Modderklip Boerdery without the use and enjoyment of its land", whereas there was no question that "Blue Moonlight will be able to execute an eviction order if it has to."³² Thus *Modderklip* and *Blue*

²⁶ *Modderklip* SCA paras 43-44. At para 44 the SCA concluded that it would be inappropriate for it to consider the quantum of constitutional damages to be paid to Modderklip as these issues had not been canvassed, and instead ordered an inquiry into the amount of damages, which should be calculated with reference to s 12(1) of the *Expropriation Act* 63 of 1975 (as referring to the market value of the relevant land).

²⁷ See for example *Modderklip* CC para 46, in which the Court stresses that if orders are not executed properly that would be a recipe for anarchy and the "purpose of the rule of law would be subverted."

²⁸ *Modderklip* CC para 62.

²⁹ *Modderklip* CC para 64.

³⁰ 2011 4 SA 337 (SCA) (hereafter *Blue Moonlight* SCA).

³¹ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) (hereafter *Blue Moonlight* CC).

³² *Blue Moonlight* SCA para 71. On appeal, the CC confirmed this reasoning (*Blue Moonlight* CC fn 11). The SCA also pointed out in relation to declining to order constitutional damages to the landowner, Blue Moonlight Properties 39 (Pty) Ltd, that whereas "Modderklip Boerdery was the innocent victim of a land invasion and it took all reasonable steps – and did so expeditiously – to safeguard its interests", Blue Moonlight Properties 39 (Pty) Ltd "bought the property in the full knowledge that

Moonlight have established a jurisprudential approach to private-initiated eviction orders in which the usual course for courts is to grant the eviction order and to tie this to the provision of emergency shelter for the occupiers,³³ but in which the courts have acknowledged that the magnitude of some cases renders the eviction practically impossible.

In such cases, there are only two possible remedies to protect the rights of both landowners and unlawful occupiers.³⁴ First, to allow the occupiers to remain on the property until the state is able to provide alternative shelter, and to award the landowner constitutional damages - such as in *Modderklip* - for as long as the owner has to endure the occupation. However, especially in cases of large-scale occupation and where the landowner is not happy with this arrangement, this is an unwieldy and ultimately suboptimal remedy. Arguably, in such situations, a cleaner more socio-economically progressive solution is for the courts to order the state to expropriate the relevant land, paying just and equitable compensation to the landowner and directly taking over the obligation to fulfil the occupiers' housing-related rights.

Returning therefore to the lingering question from *Modderklip*: do the South African courts have the power to compel the state to expropriate land in cases of unfeasible eviction? According to the SCA in the *Ekurhuleni*, a case in which an eviction order was sought in 2009 against some 76 families who had unlawfully occupied land since 2004 and where the municipality's only plan for them was the eradication "of all informal settlements by 2014",³⁵ the answer is no. On appeal, the SCA overturned the order of the Johannesburg High Court in which Cassim AJ *inter alia* ordered the Ekurhuleni Metropolitan Municipality "to purchase a property on which an informal settlement had been established ...", even though such an order had not been sought by the parties.³⁶

In an unusually pointed criticism of the court a quo's judgment, citing from another SCA judgment, the SCA (per Hurt AJA) commented:

it was occupied by a number of persons" (*Blue Moonlight* SCA para 71). This finding, too, was relied on in the CC (*Blue Moonlight* CC para 39).

³³ This two-stage eviction process has, since *Blue Moonlight*, run into systemic problems especially in the City of Johannesburg with the state regularly failing to uphold the orders to provide emergency shelter, resulting in eviction orders constantly having to be varied. See for example Dugard 2014 CCR 265.

³⁴ For a full discussion of possessory property remedies, including constitutional damages and compensation for expropriation, see Boggenpoel *Property Remedies* 91-178.

³⁵ *Ekurhuleni Municipality v Dada* 2009 4 SA 463 (SCA) (hereafter *Ekurhuleni*) para 8.

³⁶ *Ekurhuleni* para 1.

'In exercising the judicial function, judges are themselves constrained by the law'. This dictum from the recent decision of this court in *National Director of Public Prosecutions v Zuma*³⁷ restates a time-honoured rule and is probably a sanguine reminder to a judiciary which might often, in its efforts to achieve the objects of the Bill of Rights in the Constitution, be tempted to chafe against the concept of 'progressive' as opposed to 'immediate' realisation of constitutional objectives, especially at the governmental and municipal levels. This is a case in point.³⁸

Disapproving of the "robust approach" taken by Cassim AJ in relation to the "level of inactivity" shown by the municipality vis-à-vis the circumstances of the occupiers, Hurt AJA described the approach as "the very antithesis of the approach which this court and the Constitutional Court have endorsed in a number of recent decisions" that have stressed the need for "judicial deference".³⁹ Despite grudgingly acknowledging that Cassim AJ was "perhaps right in coming to the conclusion that the municipality had not dealt with the problems of the informal settlement on the property with the measure of alacrity which could be reasonably expected of them", for Hurt AJA separation of powers concerns clearly dominated. Concluding that the municipality's failures "did not justify [Cassim AJ's] adopting a solution which was well outside the limits of his powers",⁴⁰ Hurt AJA overturned the court a quo's order for the municipality to purchase the land, noting that the issue in the main application relating to the eviction of the occupiers "has yet to be set down for a hearing and dealt with by the court of first instance."⁴¹ Yet the SCA's strident rejection in *Ekurhuleni* of the judiciary's capacity to order the state to expropriate land in the context of fulfilling its section 26-related obligations has evidently not been universally accepted, and has been challenged in the current *Fischer* case.

3 *Fischer*

The *Fischer* litigation began after the City of Cape Town demolished shacks belonging to people who had unlawfully occupied a piece of privately-owned land that became known as Marikana, in Philippi, Cape Town, between April and August 2013 and in early 2014.⁴² In February 2014 the Legal Resources Centre (LRC) threatened the city with a spoliation application on behalf of the occupiers, and in response the property owner (Mrs Fischer) and the

³⁷ *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 15.

³⁸ *Ekurhuleni* para 1.

³⁹ *Ekurhuleni* para 10.

⁴⁰ *Ekurhuleni* para 14.

⁴¹ *Ekurhuleni* paras 14 and 15.

⁴² The occupiers had previously been evicted, in waves, from backyard shacks from approximately 26 areas of Cape Town.

City of Cape Town launched an urgent application in the Western Cape High Court to interdict further occupation of the property.⁴³ The LRC then brought a counter-application challenging the destruction of the occupiers' homes by the City's "anti-land invasion" unit. The application for an interdict was settled, with the occupiers agreeing to an interdict that restrained further occupation of the Fischer property, but excluded those occupiers who were already present on the property.⁴⁴

Regarding the spoliation application, on 14 March 2014, the High Court (per Gamble J) found the City's approach, which was to argue that it had demolished only those structures it found without people or personal effects inside them, to be "fundamentally flawed" in that instead of substantively questioning whether informal and/or temporary structures were homes, the City took a decision based on which structures were occupied at the time of the demolition.⁴⁵ Gamble J consequently rejected the City's argument that it was entitled to demolish any such unoccupied structures without a court order, and ordered the City to rebuild the shacks.⁴⁶ The owner and the City were granted leave to appeal the decision to the SCA. On 27 May 2014 the SCA set aside the High Court order, referring the matter back to the High Court for the hearing of oral evidence regarding the City's conduct,⁴⁷ but the spoliation application was later withdrawn following the settlement of the interdict application.⁴⁸ Despite the interdict, the Fischer property and surrounding land became known as potentially available for occupation by very poor people with nowhere else to go, and substantial numbers of people moved onto the properties throughout 2014.⁴⁹

By the beginning of 2015, when Mrs Fischer instituted an application for the eviction of the occupiers from her land in terms of section 4 of PIE, the Marikana settlement had grown to approximately 6,000 households comprising at least 20,000 people occupying several privately-owned

⁴³ First Respondents' Heads of Argument (17 August 2016) para 11, *Fischer v Persons Listed on Annexure X to the Notice of Motion and those Persons whose Identity are Unknown to the Applicant and who are Unlawfully Occupying or Attempting to Occupy Erf 150 (Remaining Extent) Phillipi, Cape Division, Province of the Western Cape; Stock v Persons Unlawfully Occupying Erven 145, 152, 156, 418, 3107, Phillipi & Portion 0 Farm 597, Cape Rd; Copper Moon Trading 203 (Pty) Ltd v Persons whose Identities are to the Applicant Unknown and who are Unlawfully Occupying Remainder Erf 149, Phillipi, Cape Town 2018 2 SA 228 (WCC)* (*Fischer*).

⁴⁴ First Respondents' Heads of Argument (17 August 2016) para 12, *Fischer*.

⁴⁵ *Fischer v Persons Unknown* 2014 3 SA 291 (WCC) (hereafter *Fischer* High Court spoliation application).

⁴⁶ *Fischer* High Court spoliation application.

⁴⁷ *Fischer v Ramahlele* 2014 4 SA 614 (SCA).

⁴⁸ First Respondents' Heads of Argument (17 August 2016) para 13, *Fischer*.

⁴⁹ First Respondents' Heads of Argument (17 August 2016) para 14, *Fischer*.

properties of which Mrs Fischer's property is one (with a total of at least 100,000 occupiers across the properties).⁵⁰ On 25 January 2016 - mindful that eviction of such a large group of people was neither humane nor practical, and that even "if its occupants could practically be evicted, the eviction would simply result in an unlawful land occupation, or several unlawful land occupations, elsewhere"⁵¹ - Mrs Fischer amended her notice of motion seeking, as an alternative to the eviction of the residents, a two-part remedy comprising a declaration that the City had violated her constitutional property rights by failing to provide land for occupation to the occupiers and an order compelling the City, and the provincial and national housing departments if necessary to purchase her land (valued at market value as though not occupied by unlawful occupiers). The *Fischer* application was combined with two other identical applications brought by owners of the neighbouring Coppermoon and Stock properties that also form part of the Marikana settlement.

In their notice of counter-application filed on 31 March 2016, the occupiers agree that any eviction would be impractical and not just and equitable, and set out their sympathy with Mrs Fischer's situation, explaining that the occupation occurred out of necessity with the occupiers not knowing the property was privately owned (by Mrs Fischer). They further acknowledge the infringement to Mrs Fischer's property-related rights alongside the violation of their own housing-related rights. They submit, however, that the relief sought by Mrs Fischer's amended notice of motion of 25 January 2016 – namely the prayer for the court to order the state to purchase Mrs Fischer's property at market value – "is not competent as a matter of law" because the court has "no general power to compel parties before it to contract with each other", including to "enter into a sale agreement", and that, therefore, "a compulsory purchase order of the nature that Mrs Fischer seeks would not be appropriate relief in terms of section 38 of the Constitution."⁵²

Instead, according to the occupiers' counter-application, if the court is convinced that the government has "acted in breach of Mrs Fischer's constitutional rights", appropriate relief in terms of section 38 of the *Constitution* would entail directing the municipality or provincial authority to exercise their statutory powers in terms of section 9(3) of the *Housing Act*

⁵⁰ Supplementary answering affidavit, Notice of counter-application (31 March 2016) paras 7 to 8.3, *Fischer*.

⁵¹ Supplementary answering affidavit, Notice of counter-application (31 March 2016) para 8.5, *Fischer*.

⁵² Supplementary answering affidavit, Notice of counter-application (31 March 2016) paras 12, 15 and 16, *Fischer*.

107 of 1997 (*Housing Act*)⁵³ to commence proceedings to expropriate the property. Alternatively, "[i]n the event that section 9(3) of the *Housing Act* does not apply to this situation", the state's general power to expropriate the property in terms of section 2 of the *Expropriation Act* 63 of 1975 (*Expropriation Act*)⁵⁴ may be engaged and that "on the facts of this case, the state may have a duty to expropriate the property as a means of protecting both the residents' rights of access to adequate housing and protection from arbitrary eviction, and Mrs Fischer's right not to be arbitrarily deprived of property".⁵⁵ Thus the occupiers maintain that appropriate relief in terms of section 38 of the *Constitution* is for the court to direct "the City to enter into negotiations with Mrs Fischer⁵⁶ with a view to either purchasing or, if a purchase agreement cannot be reached, expropriating her property ...".⁵⁷

The occupiers furthermore stress that, beyond being appropriate, this relief is the only reasonable course of action in the circumstances:

In this case, there is no serious dispute that the occupiers cannot be practically relocated to land elsewhere. They must stay where they are. The only reasonable response to the situation is therefore to expropriate the land that the occupiers currently live on, in the furtherance of the occupiers' housing rights, and to vindicate the property owners' property rights ... Simply put, the expropriation of the ... land in this case is not only necessary, but it is the only

⁵³ Section 9(3)(a)(i) of the *Housing Act* empowers a municipality to expropriate any land required by it for the purposes of housing development in terms of any national housing programme. There are two national housing programmes that may be applicable. First, the Emergency Housing Programme, which requires municipalities to investigate and assess the need for emergency housing (including for people who will be rendered homeless by an eviction) within their area of jurisdiction and to proactively plan for this, applying for additional funds if necessary from provincial and/or national government, and if necessary by expropriating land on which people under threat of eviction currently reside in order to secure their tenure. Second, the Upgrading of Informal Settlements Programme, which prioritises *in situ* upgrading and recognises that many informal settlements are located on privately owned land and that any *in situ* upgrading might require state acquisition of the land.

⁵⁴ Section 2 of the *Expropriation Act* empowers the Minister of Public Works, subject to an obligation to pay compensation, to expropriate any property for public purposes.

⁵⁵ Supplementary answering affidavit, Notice of counter-application (31 March 2016) paras 18-19, *Fischer*.

⁵⁶ In their Heads of Argument, the occupiers cite *Makate v Vodacom (Pty) Ltd* 2016 4 SA 121 (CC) para 95 (in which the CC directed the parties to negotiate in good faith) in support of their argument that an order directing parties to negotiate in good faith constitutes appropriate relief (First Respondents' Heads of Argument (17 August 2016) para 134, *Fischer*).

⁵⁷ Supplementary answering affidavit, Notice of counter-application (31 March 2016) para 75.2, *Fischer*.

reasonable course open to a responsible organ of state presented with the situation that the parties find themselves in.⁵⁸

As underscored in the occupiers' pleadings, the *Housing Act* and *Expropriation Act* clearly empower the state to expropriate land *inter alia* to fulfil the public purpose of advancing access to adequate housing. Therefore, the crisp question raised in *Fischer* is whether the state is obliged to do so? On this question, the occupiers acknowledge that the courts have "generally set themselves against directing an organ of state to purchase unlawfully occupied property from a private landowner."⁵⁹ However, they point out that the question of whether a court "can order an organ of state to expropriate property has been left open", submitting that "in an appropriate case" it would constitute "appropriate relief" to "relieve a private property owner of the burden of accommodating unlawful occupiers by directing the expropriation of property in terms of an organ of state's statutory powers to do so."⁶⁰

Arguing that in this case the granting of the permissive power to expropriate in terms of the *Housing Act* also "imports an obligation on the authority to use the power in certain circumstances",⁶¹ the occupiers direct attention to authority establishing that "the exercise of a discretionary power may be mandatory where the circumstances or statutory context create a duty to act."⁶² Thus, in *Levy v Levy*⁶³, the SCA held:

A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, *inter alia*, the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised.⁶⁴

⁵⁸ First Respondents' Supplementary Heads of Argument (29 November 2016) paras 26 and 28, *Fischer*.

⁵⁹ Supplementary answering affidavit, Notice of counter-application (31 March 2016) para 72.1, *Fischer*.

⁶⁰ Supplementary answering affidavit, Notice of counter-application (31 March 2016) para 72.2, *Fischer*.

⁶¹ First Respondents' Heads of Argument (17 August 2016) para 122, *Fischer*.

⁶² First Respondents' Heads of Argument (17 August 2016) para 121, *Fischer* citing *Levy v Levy* 1991 3 SA 614 (AD) para 32.

⁶³ 1991 3 SA 614 (AD) (hereafter *Levy*).

⁶⁴ *Levy* para 32.

In reaching this conclusion, the SCA in *Levy* drew on the authority of *Noble & Barbour v South African Railways and Harbours*.⁶⁵ As was pointed out in *Noble*, this does not mean that every time permissive language is used in legislation this should be construed as conferring a mandatory obligation, but, as per the concurrent opinion of Lord Blackburn, "the enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right."⁶⁶ Similarly, as noted in *R v Tithe Commissioners*⁶⁷, "it has been so often decided as to have become an axiom that in public statutes words only directory, permissive or enabling may have a compulsory force where the thing is to be done for the public benefit or in advancement of public justice."⁶⁸

As argued in the heads of argument for the occupiers, in this case the city is under a mandatory obligation to act reasonably. By its own admission, it is unlikely ever to be able to accommodate the occupiers on alternative land, although some of the occupiers may benefit from emergency housing at some unspecified future date. That it may never act in respect of *all* the occupiers is unreasonable.⁶⁹ That stance leaves the occupiers and the owners none the wiser as to when the unlawful occupation of the properties will be brought to an end. Although it is true that the owners must exercise some patience,⁷⁰ they are not required to tolerate the situation for an indefinite and unascertainable period.⁷¹ In these circumstances, according to the occupiers' pleadings:

... the only reasonable course of action available to the City is to acquire the properties. Although the court may not order it to do so by reaching a purchase agreement with the owners, the court is clearly at large to direct the City to exercise its statutory powers, if the exercise of those powers is the only reasonable course of action open to it ... In the extraordinary circumstances of this case, we can think of no other reasonable course than to direct the City to exercise its powers under the Housing Act ... For that reason, it is also a

⁶⁵ *Noble & Barbour v South African Railways and Harbours* 1922 AD 527 (hereafter *Noble*) paras 539-40, which cites *inter alia* *South African Railways v New Silverton Estate Ltd* 1946 AD 830 (hereafter *South African Railways*) para 842; *Commissioner for Inland Revenue v A H King* 1947 2 SA 196 (A) paras 209-210; and *South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd* 1961 2 SA 467 (A) paras 478-80, 502-504.

⁶⁶ *Noble* para 540.

⁶⁷ 14 CB 474 (hereafter *The Commissioners*).

⁶⁸ As cited in *South African Railways* para 609.

⁶⁹ First Respondents' Heads of Argument (17 August 2016) para 128, *Fischer*.

⁷⁰ *Blue Moonlight* para 40.

⁷¹ *Blue Moonlight* para 40. First Respondents' Heads of Argument (17 August 2016) para 127, *Fischer*.

course of action the City is legally obliged to adopt, because constitutionally informed 'public justice'⁷² requires it.⁷³

On 30 August 2017, the High Court delivered its judgment in the *Fischer* matter (per Fortuin, J). It is clear that - having concurred with the occupiers regarding the state's failure to fulfil its constitutional obligations vis-à-vis both the occupiers and the landowners - Fortuin, J grappled with the separation of powers concerns that dominated Hurt AJA's *Ekurhuleni* judgment, and which the state respondents relied on in *Fischer* to argue that the occupiers' prayers were not appropriate.⁷⁴ Seized by the City's acknowledgment of not being able to provide alternative emergency shelter to the occupiers, Fortuin, J, described her dilemma as follows:

The City has admitted that they may never be able to accommodate the occupiers elsewhere. This leaves the applicants and the occupiers alike in an untenable position. The only reasonable course of action is for the occupiers to stay where they are, thereby enforcing their rights in terms of s26. The question is how to do this without encroaching on the s25 rights of the applicants. Moreover, the question is how to achieve this goal without, by ordering the parties to perform in a specific way, overstepping the boundaries of the doctrine of separation of powers, i.e. how to avoid the mistake made by the High Court in the *Ekurhuleni Municipality* matter. This is the balancing act this court will have to perform.⁷⁵

To add to the balancing act, on the subject of relief - relying *inter alia* on *Fose v Minister of Safety and Security*⁷⁶- Fortuin, J underscored that appropriate relief is such relief necessary to protect and enforce the *Constitution*⁷⁷ and that the court "is obliged to forge new and creative remedies in order to ensure effective relief where a constitutional right has been infringed".⁷⁸

Attempting to navigate a principled approach between the separation of powers concerns on the one hand and the need to secure an effective remedy on the other hand, Fortuin, J highlighted three critical distinctions between the *Fischer* case and *Ekurhuleni*. First, *Ekurhuleni* involved "a very small number of people", making the possibility of evicting and relocating the occupiers "very real",⁷⁹ whereas in *Fischer* there are approximately 100,000 occupiers. Second, in *Ekurhuleni* it was not concluded that the

⁷² *R v Tithe Commissioners* 14 CB 474, cited in *South African Railways* para 609.

⁷³ First Respondents' Heads of Argument (17 August 2016) paras 128-131, *Fischer*.

⁷⁴ *Fischer* para 153.1.

⁷⁵ *Fischer* para 167.

⁷⁶ 1997 3 SA 786 (CC) (hereafter *Fose*).

⁷⁷ *Fischer* para 22 citing *Fose* para 19.

⁷⁸ *Fischer* para 160.

⁷⁹ *Fischer* para 164.

state could not provide alternative emergency shelter, whereas in *Fischer* "it is undisputed that the City cannot provide alternative accommodation for the occupiers."⁸⁰ Third, whereas in *Ekurhuleni* the occupiers had not raised the matter of expropriation, in *Fischer* the occupiers had explicitly raised this as part of their prayers.⁸¹ On this basis, Fortuin, J concluded in line with the occupiers' pleadings, that the only reasonable remedy was to order the City to "enter into good faith negotiations with Mrs Fischer [and the other landowners] in order to purchase her property ..."; to order the National Minister of Housing and/or the Provincial Minister of Housing: Western Cape Government to provide the City "with the necessary funds to purchase Mrs Fischer's property, should such funds fall beyond the City's budget"; and, in the event of any failure to agree on the value of the property within one month of the order, to report back to the court on the progress of the negotiations.⁸²

4 Conclusion

Seeking to ensure sound legal reasoning and a coherent approach to expropriation, property law luminary Andre van der Walt has proposed a narrow approach regarding the sources of expropriation, with the focus very much on administrative expropriation.⁸³ In this regard Van der Walt has argued against recognising statutory and constructive expropriation in South Africa.⁸⁴ Regarding judicial expropriation, Van der Walt was clearly cautious, noting that "uncommonly", "legislation can authorise a court to bring about judicial expropriation by making an appropriate order in terms of the statute."⁸⁵

It is clear that, while the *Housing Act* and *Expropriation Act* enable the state to expropriate property for the purposes, as in the *Fischer* case, of advancing access to adequate housing, neither piece of legislation explicitly authorises a court to "bring about judicial expropriation". However, is it possible that, where legislation empowers the state to expropriate in the public interest, courts can oblige the state to consider this option? According

⁸⁰ *Fischer* para 165.

⁸¹ *Fischer* para 165.

⁸² *Fischer* paras 197-199. The court's orders were the same in respect of the Stock and Coppermoon properties save that the court allowed two months for the negotiations to occur, since in these cases the properties had been acquired for commercial purposes, whereas Mrs Fischer had inherited her property and it was her only residential property, heightening the need for urgent resolution.

⁸³ Van der Walt *Constitutional Property Law* 433.

⁸⁴ Van der Walt *Constitutional Property Law* 433.

⁸⁵ Van der Walt *Constitutional Property Law* 433.

to Van der Walt, the "power of expropriation is based on statute and granted to specific administrators, who must exercise their statutory discretion when taking the administrative decision whether or not to expropriate", and that the "courts cannot usurp this discretion or direct the expropriator in its exercise of the discretion."⁸⁶ In some instances, it might be possible to "attack the administrative failure to take a decision, but that will only be the case when there was a clear duty on the administrator to make the decision at the particular point in time."⁸⁷

Although not (yet) constituting outright judicial expropriation, the *Fischer* case constitutes a new, grey area between administrative and judicial expropriation. For the first time in South Africa, a court has ordered the state to negotiate with private landowners with a view to purchasing their properties or, if a purchase price cannot be agreed, to report back to the court on the progress of the negotiations. While this might seem like a radical move by the court that certainly goes beyond Van der Walt's caution (above), it is arguably a necessary approach in the light of the systemic failure of the state (whether national, provincial or local, and across the country) to fulfil its section 26 housing rights-related obligations. In this context - and specifically in cases in which there are large numbers of occupiers on private land - the courts might have to gingerly step some way across the traditional separation of powers line towards the realm of judicial expropriation in order to uphold constitutional rights, including the section 28 right to an effective remedy.

After all, the central consideration for courts in crafting remedies for violations of constitutional rights "is to ensure the effective vindication and protection of the right violated."⁸⁸ Sandra Liebenberg explains that this is important not only to the immediate victims of the relevant rights violations, but also to the broader public, in order to ensure the "effective protection of constitutional rights", which "are fundamental to the fabric of our post-1994 constitutional democracy."⁸⁹ To this end, as emphasised by the Constitutional Court in *Fose*, the *Constitution* provides a permissive framework for the crafting of creative and effective remedies.⁹⁰

Just as *Modderklip* provided the novel remedy of constitutional damages, *Fischer* has developed the novel remedy of ordering the state to negotiate

⁸⁶ Van der Walt *Constitutional Property Law* 386.

⁸⁷ Van der Walt *Constitutional Property Law* 386-387.

⁸⁸ Liebenberg 2016 *PELJ* 4.

⁸⁹ Liebenberg 2016 *PELJ* 4.

⁹⁰ For more on remedies see for example Bishop "Remedies".

with landowners regarding taking over their properties to fulfil its section 26 housing obligations. In doing so, *Fischer* has gone some way towards answering the question left hanging by both the SCA and CC in the *Modderklip* case, regarding whether a court may order an organ of state to expropriate property in instances of unfeasible eviction, providing a compellingly transformative interpretation of the law in relation to housing rights.⁹¹

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⁹¹ At the time of writing, the *Fischer* judgment had been taken on appeal by the City of Cape Town but had not yet been set down for a hearing.

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List of Abbreviations

CC	Constitutional Court
CCR	Constitutional Court Review
LRC	Legal Resources Centre
PELJ	Potchefstroom Electronic Law Journal
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act
SCA	Supreme Court of Appeal